Herbert Thomas Small v Elizabeth Mary Small (Kerajaan Malaysia & Anor, interveners)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S8–24–994 OF 2004
FAIZA TAMBY CHIK J
5 OCTOBER 2004

Family Law — Children — Custodianship — Jurisdiction — Forum non conveniens — Parties are all Australian citizens — Plaintiff husband applied for ex parte interim order for interim custody and interim guardianship of the daughter — Defendant wife obtained final Australian orders for residency (equivalent to 'custody, care and control') of the daughter, for the daughter to be returned to the defendant wife — Recognition of foreign order — Burden of proving appropriateness of forum — Whether plaintiff husband had not shown any exceptions to the general rule on forum non conveniens — Whether the daughter was 'ordinarily resident' in Australia prior to her abduction — Whether plaintiff husband had submitted to the jurisdiction of the Australian courts — Whether plaintiff husband's application mala fide and abuse of the court's process

The defendant wife and the plaintiff husband were married on 11 May 1991. The daughter, Lucinda Anna Nicolls-Small ('the daughter') was born on 26 March 1992. The plaintiff husband, the defendant wife and the daughter are all Australian citizens. The defendant wife, the plaintiff husband and the daughter resided in the United Kingdom from 1994 to 1997, but returned to Australia in December 1998. The defendant wife and the daughter had been living in Australia from that time to December 2002. The daughter had been well-settled in Australia and was schooling in Australia prior to her abduction by the plaintiff husband. The defendant wife and plaintiff husband had been having marital problems for some time. They were living apart at the time of the daughter's abduction by the plaintiff husband. The daughter remained living with and in the custody and care of the defendant wife. In December 2002, the plaintiff husband left Australia with the daughter ostensibly for a holiday to the United Kingdom, France and Italy. The plaintiff husband and the daughter did not return to Australia by the end of January 2003 as scheduled, for the start of the daughter's school term. Unknown to the defendant wife, the plaintiff husband and the daughter entered Malaysia in January 2003 and without the defendant wife's knowledge and/or consent. Upon the plaintiff husband's failure to return the daughter, and upon realising he had no intention to do so, the defendant wife applied to the Australian courts on 4 February 2003 for orders for the custody and return of the daughter to Australia. The defendant wife obtained an interim Australian court order dated 17 April 2003 for, among others, the daughter to reside with the defendant wife, that the defendant wife have the sole responsibility for the day to day care, welfare and development of the daughter, and that the plaintiff husband return the daughter forthwith to her in Australia. On 19 August 2003, the plaintiff husband was issued a visit pass (social) by Malaysian immigration under the 'Malaysia My Second Home Programme' whereby he is permitted to enter and remain in West

Malaysia and Sabah only until 18 August 2005. The daughter's Malaysian social visa had expired and upon attending at the Malaysian Immigration for its renewal on 11 April 2003, the daughter's Australian passport, having been cancelled, had to be returned to the Australian Government. The daughter hence and up until the present has no valid passport in her possession. Despite the plaintiff husband's submission to and participation in the Australian proceedings, the plaintiff husband filed an originating summons dated 22 May 2004 and, without disclosing the Australian court proceedings, promptly on 24 May 2004 proceeded to apply for and obtained an ex parte interim order for, inter alia, interim custody and interim guardianship of the daughter. On 25 May 2004, the defendant wife obtained final Australian orders for, inter alia, residency (equivalent to 'custody, care and control') of the daughter, for the daughter to be returned to the defendant wife.

Held:

(1) It was clear that Australia is the forum with the most real and substantial connections with these proceedings involving Australian citizens and an Australian child who has no real and substantial connection with Malaysia, and that accordingly the Australian court would be the more appropriate or natural forum to hear the matter, being distinctly more suitable for the ends of justice in this particular matter than the Malaysian court (see para 5).

(2) The plaintiff husband had not shown any exceptions to the general rule on forum non conveniens on 'injustice; 'special circumstances; or 'personal or juridical advantage' in these proceedings, save and except that he could attempt to get a different order here than that already decided by the Australian court. It must be borne in mind that the Australian court had already adjudicated and decided the matter. Given that the daughter's passport had been cancelled by her home country, the daughter without an Australian passport will forever be a fugitive. She has to return to Australia, her home, which is the appropriate forum for these proceedings (see para 6).

(3) The daughter in these proceedings, was 'ordinarily resident' in Australia prior to her abduction, and as such, the final Australian residency order dated 25 May 2004 should be given special consideration by this court in arriving at its decision on guardianship, custody, care and control of the daughter (see para 7). For these reasons and in the circumstances the daughter was 'ordinarily resident' in Australia prior to her abduction and that accordingly, following *In re P (GE) (An Infant)* [1965] 1 Ch 568, the court should take special consideration of the decision of the court of the country where the child is ordinarily resident in especially the Australian residency order obtained by the defendant wife for residency of the daughter in the Australian proceedings in which the plaintiff husband was at all material times fully aware of and had in fact participated in by filing affidavits in his defence (see para 9).

(4) The plaintiff husband had clearly submitted to the jurisdiction of the Australian courts by the filing of not one, but two, detailed affidavits in his defence and should therefore be stopped from inequitably taking a second bite at the cherry by instituting these Malaysian proceedings (see para 17).

(5) The existence of the proceedings for custody of the daughter, of which the plaintiff husband was fully aware of at all material times and had even participated in by the filing of affidavits in his defence, merited disclosure prior to this court making the decision to involve itself in considering the same matters previously considered by the Australian courts, thus wasting this court's valuable time in litigating a matter which had already been litigated elsewhere. The fact that the plaintiff husband did not disclose such a material fact was a clear manifestation of the plaintiff's deceit, mala fide and abuse of the court's process and should itself be a justified ground for setting aside the ex parte interim order and a refusal in the face of such deceit for this court to continue to entertain and consider any further proceedings by the plaintiff husband (see para 19).

(6) The plaintiff husband brought the daughter to Malaysia without the defendant wife's knowledge and consent, that was unilaterally, severing contact between the daughter and the defendant wife. In applying the welfare principle in the interests of justice and the welfare of the daughter the court should not countenance such a unilateral movement of the daughter to Malaysia. In 'kidnapping' cases such as the present, where the child was abducted by one parent and brought to another country without the other parent's knowledge and consent, it is in the child's welfare to be returned to its home country, unless there is compelling reason to the contrary, or the child would come to any harm if returned (see para 20).

[Bahasa Malaysia summary

Defendan isteri dan plaintif suami telah berkahwin pada 11 Mei 1991. Anak perempuan mereka, Lucinda Anna Nicolls-Small ('anak perempuan') telah dilahirkan pada 26 Mac 1992. Plaintif suami, defendan isteri dan anak perempuan tersebut kesemuanya warganegara Australia. Defendan isteri, plaintif suami dan anak perempuan mereka telah menetap di United Kingdom daripada 1994 hingga 1997, tetapi kembali ke Australia dalam bulan Disember 1998. Defendan isteri dan anak perempuannya telah menetap di Australia dari masa itu hingga Disember 2002. Anak perempuan tersebut sedang menetap di Australia dan bersekolah di Australia sebelum penculikannya oleh plaintif suami. Defendan isteri dan plaintif suami mengalami masalah perkahwinan untuk beberapa lama. Mereka tinggal berasingan pada masa penculikan anak perempuan oleh plaintif suami. Anak perempuan itu masih tinggal dan berada dalam jagaan dan kawalan defendan isteri. Pada Disember 2002, plaintif suami meninggalkan Australia bersama anak perempuannya kononnya untuk bercuti ke United Kingdom, France dan Itali. Plaintif suami dan anak perempuan tidak kembali ke Australia pada hujung bulan Januari 2003 seperti yang dijadualkan, untuk mulakan semester persekolahan anak perempuan itu. Tanpa diketahui oleh defendan isteri, plaintif suami dan anak perempuan telah tiba di Malaysia pada bulan Januari 2003 dan tanpa pengetahuan defendan isteri dan/atau persetujuannya. Oleh sebab kegagalan plaintif suami untuk mengembalikan anak perempuan itu, dan menyedari beliau tiada niat untuk berbuat demikian, defendan isteri telah memohon ke mahkamah Australia pada 4 Februari 2003 untuk perintah hak penjagaan dan pemulangan anak perempuan itu ke Australia. Defendan isteri telah memperoleh perintah interim mahkamah Australia bertarikh 17 April 2003

untuk, antara lain, anak perempuan itu tinggal bersama defendan isteri, agar defendan isteri mempunyai tanggungjawab mutlak untuk penjagaan harian, kebajikan dan perkembangan anak perempuannya, dan agar plaintif suami memulangkan anak perempuan itu kepadanya di Australia. Pada 19 Ogos 2003, plaintif suami diberikan kan pas lawatan (sosial) oleh pihak imigresen Malaysia di bawah 'Malaysia My Second Home Programme' di mana beliau dibenarkan masuk dan berada di Malaysia Barat dan Sabah hanya sehingga 18 Ogos 2005. Visa sosial Malaysia anak perempuan itu telah luput dan apabila pergi ke Imigresen Malaysia untuk pembaharuannya pada 11 April 2003, pasport Australia anak perempuan itu, yang telah dibatalkan, perlu dipulangkan ke Kerajaan Australia. Anak perempuan itu sehingga sekarang tidak memiliki pasport yang sah. Meskipun hujah dan penglibatan plaintif suami dalam prosiding Australia, plaintif suami telah memfailkan satu saman pemula bertarikh 22 Mei 2004 dan, tanpa mendedahkan prosiding mahkamah Australia, dengan segera pada 24 Mei 2004 telah memohon untuk dan memperoleh perintah interim ex parte untuk, antara lain, hak penjagaan sementara anak perempuan itu. Pada 25 Mei 2004, defendan isteri telah memperoleh perintah muktamad Australia untuk, antara lain, penetapan kediaman (yang sama kepada 'custody, care and control') anak perempuan itu, agar anka perempuan itu dikembalikan kepada defendan isteri.

Diputuskan:

(1) Ia adalah jelas bahawa Australia adalah forum dengan hubungan sebenar dan penting berkaitan prosiding tersebut termasuklah warganegara Australia dan kanak-kanak Australia yang tiada hubungan sebenar dan penting dengan Malaysia, dan bahawa sewajarnya mahkamah Australia merupakan forum yang lebih sesuai atau asli untuk mendengar perkara ini, yang sememangnya lebih sesuai demi mendapat keadilan dalam perkara sedemikian daripada mahkamah Malaysia (lihat perenggan 5).

(2) Plaintif suami tidak menunjukkan apa-apa pengecualian kepada rukun am berhubung forum non conveniens tentang 'injustice; 'special circumstances; atau 'personal or juridical advantage' wujud dalam prosiding tersebut, dengan syarat dan kecuali beliau boleh cuba mendapatkan perintah berbeza di sini daripada apa yang telah diputuskan oleh mahkamah Australia. Perlulah ditekankan bahawa mahkamah Australia telahpun mengadili dan memutuskan perkara tersebut. Dengan mengambilkira bahawa pasport anak perempuan itu telah dibatalkan oleh negara kediamannya, anak perempuan itu adalah tanpa pasport Australia akan selamanya menjadi pelarian. Beliau perlu kembali ke Australia, kediamannya, yang merupakan forum sesuai untuk prosiding tersebut (lihat perenggan 6).

(3) Anak perempuan dalam prosiding tersebut, merupakan 'ordinarily resident' di Australia sebelum penculikannya, dan oleh demikian, perintah kediaman muktamad Australia bertarikh 25 Mei 2004 hendaklah diberikan pertimbangan khas oleh mahkamah ini apabila tiba kepada keputusan berhubung hak penjagaan dan kawalan anak perempuan itu (lihat perempuan (lihat perenggan 7). Untuk alasan tersebut dan dalam keadaan di mana anak perempuan itu merupakan 'ordinarily resident' di Australia sebelum

penculikannya dan bahawa sewajarnya, mengikut *In re P (GE) (An Infant)* [1965] 1 Ch 568, mahkamah hendaklah mengambil pertimbangan khas tentang keputusan mahkamah negara di mana anak itu asalnya menetap khususnya dalam perintah kediaman Australia yang diperoleh oleh defendan isteri untuk kediaman anak perempuan dalam prosiding Australia yang mana plaintif suami pada setiap masa matan sedar dan terlibat dalamnya melalui pembfailan afidavit-afidavit pembelaan beliau (lihat perenggan 9).

(4) Plaintif suami jelas mematuhi bidang kuasa mahkamah Australia dengan memfailkan bukan sahaja satu, tetapi dua, afidavit-afidavit pembelaannya dengan terperinci dan henkdalah dihalang daripada mengambil peluang yang tidak saksama dengan memulakan prosiding Malaysia tersebut (lihat perenggan 17).

(5) Kewujudan prosiding untuk hak penjagaan anak perempuan itu, yang mana plaintif suami amat sedar pada setiap masa matan dan telahpun terlibat dalamnya dengan memfailkan afidavit-afidavit pembelaannya, memeritkan pendedahan sebelum mahkamah ini membuat keputusan untuk melibatkan diri dalam memutuskan perkara sama yang telah diputuskan oleh mahkamah Australia, dengan itu membuang masa mahkamah ini mengendalikan suatu perkara yang telahpun dilitigasikan di tempat lain. Hakikat bahawa plaintif suami tidak mendedahkan fakta material adalah jelas penyataan tentang penipuan, niat jahat dan penyalahgunaan proses mahkamah oleh plaintif dan sepatutnya menjadi alasan yang dijustifikasikan untuk mengetepikan perintah interim ex parte dan penolakan terhadap penipuan sedemikian untuk mahkamah ini terus melayan dan menimbangkan apa-apa prosiding seterusnya oleh plaintif suami (lihat perenggan 19).

(6) Plaintif suami telah membawa anak perempuan itu ke Malaysia tanpa pengetahuan dan persetujuan defendan isteri, yang melibatkan satu pihak, memutuskan hubungan antara anak perempuan dan defendan isteri. Dalam menggunakan prinsip kebajikan demi kepentingan memperoleh keadilan dan kebajikan anak perempuan itu mahkamah patut bersetuju terhadap pergerakan di satu pihak anak perempuan itu ke Malaysia. Dalam kes-kes 'kidnapping' seperti di sini, di mana naka itu diculik oleh salah seorang daripada ibu bapanya dan dibawa ke negara lain tanpa pengetahuan dan persetujuan ibu atau bapa yang satu lagi, ia adalah demi kebajikan anak itu agar ia dikembalikan ke negara asalnya, kecuali terdapat alasan di mana terpaksa berbuat sebaliknya, atau jika anak itu akan berada dalam bahaya jika dikembalikan (lihat perenggan 20).]

Notes

For cases on custodianship, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2727–2837.

Cases referred to

A (an infant), Re [2002] 2 SLR 137 (refd)

Abidin Daver, The [1984] 1 AC 398 (refd)

American Express Bank Ltd v Mohamed Toufic Al-Qzeir & Anor [1995] 1 MLJ 160 (refd)

Brinkerhoff Maritime Drilling Corp & Anor v PT Airfast Services Indonesia and another appeal [1992] 2 SLR 776 (refd)
de Dampierre v de Dampierre [1987] 2 All ER 1 (refd)
E (D) (An Infant), In re [1967] 1 Ch 761 (refd)
G v G (Minors) (Abduction) Vol 2 (1991) Family Law Review (refd)
H (Infants), In re [1966] 1 WLR 381 (refd)
L (Minors) (Wardship: Jurisdiction), In re [1974] 1 WLR 250 (refd)
Neduncheliyan Balasubramaniam v Kohila a/p Shanmugam [1997] 3 MLJ 768 (refd)
P (GE) (An Infant), In re [1965] 1 Ch 568 (refd)
Sandy M Chiew @ Martinez v James Chiew Siew Hua [2003] 2 MLJ 168 (refd)
Sino Pac Development (Thailand) Ltd v Patrick Yap Huan Ju [1998] 5 MLJ 52 (refd)
Spiliada Maritime Corporation v Cansulex Ltd [1986] WLR 972 (refd)
T (Infants), Re [1968] 1 Ch 704 (refd)
Tan Poey Kheng v Ma Peng Kiat [1984] 1 MLJ 58 (refd)

(*Mahani Hamid & Yasmeen) for the plaintiff.*
(*YN Foo & Partners) for the defendant.*

Faiza Tamby Chik J:

[1] The defendant wife in her summons in chambers dated 28 July 2004 in encl (17) prayed as follows:

(i) The interim order of this honourable court dated 24 May 2005 be set aside.

(ii) The child Lucinda Anna Nicolls-Small be delivered forthwith into the custody, care and control of the defendant mother in accordance with the Australian court order dated 25 May 2004.

(iii) The child Lucinda Anna Nicolls-Small be returned forthwith to Australia.

(iv) Alternatively, that guardianship, custody, care and control of the child Lucinda Anna Nicolls-small be granted to the defendant mother, Elisabeth Mary Small.

(v) Costs of the proceedings herein be borne by the plaintiff.

(vi) Any further and/or other relief which this court deems fit and just.

[2] From the pleadings and affidavits filed in this case, the facts are that The defendant wife and the plaintiff husband were married on 11 May 1991. The daughter, Lucinda Anna Nicolls-Small ('the daughter') was born on 26 March 1992. The plaintiff husband, the defendant wife and the daughter are all Australian citizens. The plaintiff is a retired airline pilot, having retired in early 1994. The defendant wife is a qualified registered nurse. The defendant wife, the plaintiff husband and the daughter resided in the UK from 1994 to 1997, but returned to Australia in December 1998. The defendant wife and the daughter have been living in Australia from that time to December 2002. The daughter had been well-settled in Australia and was schooling in Australia prior to her abduction by the plaintiff husband. The defendant wife and plaintiff husband had been having marital problems for some time. They were living apart at the time of the daughter's abduction by the plaintiff husband, the plaintiff husband having moved out of their

matrimonial home. The daughter remained living with and in the custody and care of the defendant wife. In December 2002, the plaintiff husband left Australia with the daughter ostensibly for a holiday to the United Kingdom, France and Italy. The plaintiff husband and the daughter did not return to Australia by the end of January 2003 as scheduled, for the start of the daughter's school term. Unknown to the defendant wife, the plaintiff husband and the daughter entered Malaysia in January 2003 and without the defendant wife's knowledge and/or consent, registered the daughter at the Fairview international School in Kuala Lumpur. Upon the plaintiff's failure to return the daughter, and upon realising he had no intention to do so, the defendant wife applied to the Australian Courts on 4 February 2003 for orders for the custody and return of the daughter to Australia. The defendant wife obtained an interim Australian court order dated 17 April 2003 for, among others, the daughter to reside with the defendant wife, that the defendant wife have the sole responsibility for the day to day care, welfare and development of the daughter, and that the husband return the daughter forthwith to her in Australia. It is noted that the Australian order of 17 April 2003 also provided for the defendant wife to be issued with 'such travel documents as are necessary to enable the child Lucinda Anna Nicolls-Small,… to travel to Australia. To issue the defendant wife with a passport to enable the daughter to travel to Australia, the daughter's own passport had to be cancelled and this was promptly done by the Australian authorities. On 19 August 2003, the defendant husband was issued a Visit Pass (Social) by Malaysian immigration under the 'Malaysia My Second Home Programme 'whereby he is permitted to enter and remain in West Malaysia and Sabah only until 18 August 2005. On 7 October 2003, the defendant wife obtained another Interim Australian Order to among others, restrain the husband from causing the young daughter to undergo a psychiatric/psychological evaluation. The plaintiff had filed two affidavits in the Australian proceedings, both affirmed on 6 October 2003, and had also via his affidavits sent to the Australian Court an affidavit by psychiatrist Dr Nor Hamidah Mohd Salleh, purporting to have carried out a psychological evaluation on the daughter without the presence of and without interviewing the defendant wife. There was also an affidavit by one Jaswant Kaur a/p Banta Singh affirmed on 2 October 2003 regarding the plaintiff and defendant wife's visit to the Ampang Police Station on 12.6.2003. Ms. Jaswant had accompanied the plaintiff to the said Police Station. Besides the plaintiff's participation in the Australian proceedings as aforesaid, the plaintiff had written to the Law Society and the Family Court in Australia and to the defendant wife's solicitor, Irene Pickel regarding the Australian proceedings, evidencing the plaintiffs knowledge of the same. The plaintiff had also written to the Australian Prime Minister John Howard regarding the cancellation of the daughter's Australian passport on 4 August 2003, and the corresponding response dated 19 August 2003 from the Australian Prime Minister's Department set out clearly that the daughter's passport was cancelled pursuant to Australian Court Orders and that the cancellation of the passport was the prerogative of the Minister, approved representative or the approved senior officer and that a passport on being cancelled becomes void. The plaintiff thus knew by 19 August 2003 that there were Australian Court Orders which had resulted in the cancellation of the daughter's Australian passport. The email address used by the plaintiff to correspond with the Australian Prime Minister's Department and the defendant wife's Australian solicitor Irene Pickel was the daughter's email address, that is the same address the plaintiff used to send what he purports to be emails emanating from the daughter.

The daughter's Malaysian Social Visa had expired and upon attending at the Malaysian Immigration for its renewal on 11 April 2003, the daughter's Australian passport, having been cancelled, had to be returned to the Australian Government. The daughter thence and up until the present has no valid passport in her possession. Despite his submission to and participation in the Australian proceedings, the plaintiff husband filed the originating summons herein dated 22 May 2004 and, without disclosing the Australian court proceedings, promptly on 24 May 2004 proceeded to apply for and obtained an ex parte interim order for, inter alia, interim custody and interim guardianship of the daughter. On 25 May 2004, the defendant wife obtained Final Australian Orders for, inter alia, residency (equivalent to 'custody, care and control') of the daughter, for the daughter to be returned to the defendant wife. The plaintiff husband was at all material times aware, and was in fact at the time of the institution of the current proceedings via his originating summons dated 22 May 2004, fully aware of the Australian proceeding by the defendant wife for residency of the daughter in Australia. The defendant wife has been deprived of her daughter's society for the past 18 months, barring one meeting with the daughter in June 2003 for six hours under the defendant's close and threatening supervision. The daughter was 10 years old at the time of the abduction and turned 12 years early this year. On 29 July 2004, and despite being without a valid passport, the plaintiff has purportedly obtained a social visit pass for the daughter issued on 29 July 2004, the validity of which expires, on the face of it, one year from the date of issue. The plaintiff had kept his whereabouts and the whereabouts of Lucy hidden from the defendant wife. The defendant wife was only able through the services of a private investigator to track the daughter by reason of her registration at Fairview International School, Kuala Lumpur. Sometime after meeting the defendant wife in June 2003, the plaintiff and the daughter disappeared (to, it is believed Thailand) for some months. The daughter has been kept out of school for more than one year from June 2003.

[3] In this case before me, it is significant that the plaintiff, the defendant and the daughter, all Australian citizens and had set up home and were living in Australia prior to the plaintiff bringing the daughter to Malaysia in January 2003. This is not disputed by the plaintiff. The plaintiffs only connection to Malaysia is under the 'Malaysia My Second Home Programme', which from the date of issue of the plaintiffs Social Visa under the same (19 August 2003) the plaintiff evidently obtained after entering Malaysia in January 2003. Further, even under the said Programme he is allowed to enter and remain in West Malaysia and Sabah only until 18 August 2005. It is far from certain that he would be allowed to continue to reside in Malaysia after the said date of 18 August 2005. He and the daughter remain citizens of Australia. The daughter has no valid Australian passport. Despite that, she has purportedly been issued with a temporary Social Visit Pass, which on the face of it, is valid for one year from the date of issue. Malaysian cases have recognized that where courts of different jurisdictions have the right to hear a case, nevertheless one court may be a more appropriate or natural forum for the hearing of the case. This doctrine is known as the doctrine of forum non conveniens ('the said doctrine'), acknowledged and accepted in the Malaysian courts in the case of *Sino Pac Development (Thailand) Ltd v Patrick Yap Huan Ju* [1998] 5 MLJ 52 where I stated at p 61 that:

> The doctrine of forum non conveniens has received judicial acceptance in our courts and it is accepted that a defendant to a suit may apply to a court to stay the action on the ground that this court is not the appropriate forum and there exists another more appropriate forum to hear the matter.

[4] This is because the more appropriate forum is the one that has the most real and substantial connection with the action. In the *Sino Pac* case, I cited at p 60 the Malaysian Supreme Court Case of *American Express Bank Ltd v Mohamed Toufic Al-Qzeir & Anor* [1995] 1 MLJ 160 where it was stated that a 'prominent factor' in applying the said doctrine was whether any particular forum is one with which the action has the most real and substantial connection' In the Singapore Court of Appeal case of *Brinkerhoff Maritime Drilling Corp & Anor v PT Airfast Services Indonesia and another appeal* [1992] 2 SLR 776, it involved claims by an American citizen and employers of the American citizen and six other employees, arising out of an air crash in Indonesia. The court here in deciding the more appropriate forum under the said doctrine chose Indonesia as the whole transaction has more real and substantial connections with Indonesia than with Singapore' (see p 785). English cases have been equally clear as to their position on the doctrine of forum non conveniens, wherein there can exist 'a more appropriate' or 'natural' forum that has the 'most real and substantial connection' to the matter. In *The Abidin Daver* [1984] 1 AC 398, the fundamental question there was the extent to which an English court was entitled to take into account proceedings in a foreign jurisdiction in determining the question of a stay on the ground of forum non conveniens. Lord Diplock of the English House of Lords categorically held at p 411 that:

> Where a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in a foreign suit seeks to institute as plaintiff in an action in England about the same matter to which the person who is plaintiff in the foreign suit is made defendant…

Lord Keith of Kinkel further expressed at p 415 that:

> … A distinction was to be drawn between a case where England is the natural forum for the plaintiff to bring his action and a case where it is not. By 'the natural forum' I mean that with which this action had the most real and substantial connection.

Lord Templeman ended by saying at p 426 that '… there was no justification for inflicting English proceedings on the Turkish owners in addition to the Turkish proceedings.

In *Spiliada Maritime Corporation v Cansulex Ltd* [1986] WLR 972 which is affirmed in both *Sino Pac* and *American Express v Mohamed Toufic* aforesaid, the English House of Lords at p 986 held that under the doctrine of forum non conveniens, a party had to establish that 'there is another available forum which is clearly or distinctly more appropriate than the English forum.'

In *de Dampierre v de Dampierre* [1987] 2 All ER 1, there was a matrimonial dispute where proceedings had been brought in both France and England, and in which the maintenance laws in both countries was a main issue, the English House of Lords here affirmed the case of Spiliada Maritime aforesaid and significantly held at p 6 that:

> The wife is French, she was married in France, she can litigate in France as easily as in England and she can obtain from the French court all the redress to which she is entitled under French law. The wife cannot sever her direct French connections derived from ancestry, birth, nationality, education, culture and marriage laws, or her indirect French connections through her husband and child.

The Singapore Court had the opportunity to apply this principle to a case with similar facts to these proceedings before me. *Re A (an infant)* [2002] 2 SLR 137, Singapore High Court, concerned a dispute as to the custody of a six year old child. The court here stated at p 139:

> The forum with the most real and substantial connections with the adjudication of the issues of custody and access would be the more appropriate forum; 'and that further the issue was 'which forum would more effectively evaluate the best interests of the child, in terms of a tribunal's understanding of and affinity to the cultural background, value systems, social norms and other societal circumstances relevant to the best way in which the child is to be brought up.

Significantly, it was stated at p 142 that 'in the context of these proceedings involving the custody of a child, an important consideration must be the child's cultural connections and affinity for the cultural and societal environment which the forum serves a child's best interest is best determined by the forum which is best equipped to determine what is best for the child in all material aspects ranging from its health care, education, moral and spiritual and other relevant needs.

[5] I am of the opinion that the significant facts or circumstances to note in these proceedings before me are that:

(i) The daughter's Australian passport had been cancelled by the Australian government in April 2003 pursuant to the Australian order dated 17 April 2003. The daughter does not have a valid Australian passport. The daughter purportedly been issued with a social visit pass, which on the face of it only appears to be valid for one year. Hence, the daughter cannot remain permanently in Malaysia. She has no right of permanent residence in this country and her connection to this country is tenuous and uncertain;

(ii) The plaintiff herein, the defendant herein and the daughter who is the subject of these proceedings are all Australian citizens and had been residing in Australia prior to the plaintiff's abduction of the daughter;

(iii) The daughter was well-settled in Australia, was schooling in Australia, and hence has close cultural connections with and affinity for the cultural and societal environment which the Australian forum serves;

(iv) The defendant wife had instituted custody proceedings in Australia of which the plaintiff was at all material times aware and had in fact participated in via the filing of two affidavits in the Australian courts;

(v) The defendant wife had obtained a final Australian residency (equivalent to 'custody, care and control') order for the daughter;

(vi) The plaintiff husband himself has only a tenuous connection with Malaysia under the 'Malaysia My Second Home Programme' and hence there is lack of

certainty even as to his continued residence in Malaysia whether now or later, the daughter being an Australian, must return to Australia, her home country;

(vii) Issues raised by the plaintiff in his affidavits in these Malaysian proceedings regarding the daughter health and relationship with the mother (defendant) involve matters that occurred when the plaintiff, the defendant and the said child were in Australia or are otherwise connected with Australia, and these matters are therefore best evidenced in the Australian court.

It is thus my conclusion that given the aforesaid legal principles and the circumstances of these proceedings before me, it is overwhelmingly clear that Australia is the forum with the most real and substantial connections with these proceedings involving Australian citizens and an Australian child who have no real and substantial connection with Malaysia and that accordingly, the Australian court would be the more appropriate or natural forum to hear the matter, being distinctly more suitable for the ends of justice in this particular matter than the Malaysian court.

[6] Where there is one forum that is more appropriate for the hearing of the matter than another forum, the only occasions where the court would not remit the matter to the more appropriate forum would be where:

(i) It would be unjust to confine the plaintiff to the remedies elsewhere (*American Express v Mohamed Toufic* aforesaid); or

(ii) There are 'special circumstances' why the trial should nevertheless take place in the less appropriate forum (*Brinkerhoff Maritime Drilling Corp & Anor v PT Airfast Services Indonesia* aforesaid); or

(iii) The additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if the would be plaintiff can establish objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the action in the less appropriate forum that is of such importance that it would cause injustice to him to deprive him of it.' (*The Abidin Daver* [1984] 1 AC 398 aforesaid).

It is observed that, in these proceedings, the plaintiff has not shown this court that any of the above exceptions (to the general rule on forum non conveniens) on 'injustice; 'special circumstances; or 'personal or juridical advantage' exists in these proceedings, save and except that he could attempt to get a different order here than that already decided by the Australian court. Indeed, it must be borne in mind that the Australian court had already adjudicated and decided the matter. Given that the daughter's passport had been cancelled by her home country pursuant to the decision of the Australian court in the Australian order of 17 April 2003, the daughter without an Australian passport will forever be a fugitive. She has to return to Australia, her home, which is the appropriate forum for these proceedings.

[7] The daughter in these proceedings, was 'ordinarily resident' in Australia prior to her abduction, and as such, the Final Australian Residency Order dated 25 May 2004 should be given special consideration by this court in arriving at its decision on

guardianship, custody, care and control of the daughter. In the English Court of Appeal case of *In re P (GE) (An Infant)* [1965] 1 Ch 568, the concept of 'ordinary residence' was well-illustrated in circumstances where the child in the case had been removed from the English jurisdiction and brought to Israel by the father without the mother's consent,. Here, Lord Denning MR clearly expressed at p 585 that:

> What is the ordinary residence of a child of tender years who cannot decide for himself where to live, let us say under the age of 16? So long as the father and mother are living together in the matrimonial home, the child's residence is the home — and it is still his ordinary residence, even while he is away at boarding school. It is his base, from whence he goes out and to which he returns. When father and mother are at variance and living separate and apart and by arrangement the child resides in the house of one them — then that home is his ordinary residence, even though the other parent has access and the child goes to see him form time to time. I do not see that a child's ordinary residence, so found, can be changed by kidnapping him and taking him from his home, even if one of his parents is the kidnapper. Quite generally, I do not think a child's ordinary residence can be changed by one parent without the consent of the other.

[8] In the said case, the ordinary residence of the child in England was derived from the fact that (see p 595):

> He (ie the child) had a home with his mother in Hendon, where he was at school, and had been settled in England for several years. He had left England with his father on an English travel document which provided for a right to return within three months, and this he still had; his presence at Israel at the time of the (mother's) summons was still precarious, since he was there only on a tourist visa valid for three months. His actual residence in Israel was in those circumstances still to be regarded as insecure and unsettled, and his ordinary residence remained at the relevant time in England, even if his father had already formed the intention to remain and settle in Israel if he could.

It was also held in the same case by Lord Denning MR at p 584 in relation to orders made by the court in which the child was ordinarily resident where there were now proceedings in another, foreign, jurisdiction that:

> And if she (ie the mother whose child was kidnapped by the father) has eventually to apply to the courts of the foreign country, they will surely respect an order made by the courts of the ordinary residence-just as we should- for the simple reason that it is his (ie the child's) home and, as such, is entitle to special consideration.

And on p 586 Lord Denning MR said, '…in case of conflict, much respect should be paid to the decision of the courts of the country where the child is ordinarily resident.'

I see, the similarities between this case now before me and the case before the Court of Appeal in *In re P (GE) (An Infant)* [1965] 1 Ch 568 aforesaid are striking, to say the least:

i The daughter in these proceedings, Lucinda Small, was residing with her mother, the defendant herein, in their home in Australia prior to her abduction by the plaintiff;

ii The daughter was well-settled and schooling in Australia prior to her abduction by the plaintiff. The daughter was supposed to be returned to

Australia by the plaintiff for the start of the new school term in Australia in January 2003, but this unfortunately did not happen;

iii The daughter was taken from Australia by the plaintiff, both on Australian passports, under the pretext of a holiday. The plaintiff then brought the daughter into Malaysia in January 2003 without the defendant wife's knowledge and consent;

iv The defendant wife had not consented to any change in the ordinary residence of the daughter from Australia to Malaysia;

v The plaintiff was only granted his Social Visa under the 'Malaysia My Second Home' Programme on 19 August 2003 and as such until this date could only have been in Malaysia on a Tourist Visa, or equivalent of the same;

vi The defendant wife had instituted proceedings in Australia for residency (equivalent to 'custody, care and control') of the daughter of which the plaintiff was at all material times aware and had participated in by the filing of Affidavits, and the defendant wife was granted the final Australian Residency Order dated 15 May 2004 wherein she had obtained residency of the daughter;

vii The defendant wife had by the selfish and unscrupulous actions of the plaintiff been forced to fight in the Malaysian courts for her right to have the daughter returned to her and to Australia.

[9] For these reasons and in the circumstances, the daughter was 'ordinarily resident' in Australia prior to her abduction and that accordingly, following *In re P (GE) (An Infant)* [1965] 1 Ch 568 aforesaid, this court should take special consideration of the decision of the court of the country where the child is ordinarily resident in especially the Australian Residency (equivalent to 'custody, care and control') order dated 25 May 2004 obtained by the defendant wife for residency of the daughter in the Australian proceedings in which the plaintiff was at all material times fully aware of and had in fact participated in by filing affidavits in his defence.

[10] The Australian proceedings were commenced by the defendant wife on 4 February 2003. As aforesaid a number of orders were obtained by the defendant wife in the Australian proceedings, including two interim orders dated 17 April 2003 and 7 October 2003, culminating in the defendant wife being granted the final Australian order dated 25 May 2004 for residency (equivalent to 'custody, care and control') of the daughter ('the Australian proceedings'). At all material times, the plaintiff had notice of the Australian proceedings. The plaintiff had even participated in the Australian proceedings by filing two detailed affidavits of the plaintiffs, both dated 6 October 2003 in his defence, as well as by sending to the Australian courts, via his affidavits, the affidavit of Dr Nor Hamidah Mohd. Salleh affirmed on 3 October 2003 ('Dr Hamidah's affidavit') and the affidavit of Jaswant Kaur a/p Banta Singh affirmed on 2 October 2003 ('Jaswant Kaur's affidavit'). The plaintiff's affidavits filed in the Australian proceedings, together with Dr Hamidah's affidavit and Jaswant Kaur's affidavit, clearly set out a defence to the action and show the plaintiff's submission to the jurisdiction of the Australian court.

[11] The first affidavit of the plaintiff affirmed on 6 October 2003 (exhibited at exh 'ES-94', p 188, defendant's first affidavit) shows:

(i) In paragraph 3, the plaintiff acknowledges the Australian proceedings in the Australian court stating:

> I hope that the court (ie the Australian court) will accept these documents (ie his affidavits) by email. I intend to ask someone to take the original hard copies to the Australian High Commission…

(ii) Further, at paragraph 17, the plaintiff appeals to authority of the Australian court stating:

> … I urgently need the help of the court to give Lucy (the daughter) a stable kind and caring environment….

(iii) The plaintiff's affidavit is detailed, spanning matters of finance, the education of the daughter, and the marriage. The plaintiff also went to the trouble of exhibiting Financial 27 Statements in support of his contentions in this, his affidavit filed in the Australian proceedings in his defence.

[12] The second affidavit of the plaintiff affirmed on 6 October 2003 (exhibited at exh 'ES-9B', defendant's first affidavit) shows:

(i) Again, the plaintiff is clearly appealing to the jurisdiction of the Australian court to make a judgment on custody of the daughter in the plaintiff's favour:

(a) Paragraph 2

> I ask the court to restore my daughter to her life.

(b) Paragraph 4

> I believe I can show the court that my daughter is 'best off to be here in Malaysia.

[13] The affidavit of Dr Noor Hamidah Mohd. Salleh affirmed on 3 October 2003 (see exh 'ES-9A', p 195 of defendant's first affidavit) was clearly sent by the plaintiff to the Australian courts in order to attempt to support his case in the Australian proceedings. Indeed, Dr Hamidah's contentions are referred to at paragraphs 4 and 17 of the plaintiff's first affidavit and at paragraphs 19 and 22 of the plaintiff's second affidavit.

[14] The affidavit of Jaswant Kaur a/p Banta Singh affirmed on 2 October 2003 (see p 215, exh 'ES-9B' defendant's first affidavit) was clearly also sent by the plaintiff to the Australian courts in support of the plaintiff's defence in the Australian proceedings and was in fact referred to for such support at paragraph 10 of the plaintiff's second affidavit.

[15] It is trite law that an individual who defends an action in a particular jurisdiction has submitted to that jurisdiction. It is categorically stated at p 104, *Conflict of Law in Malaysia* by RH Hickling and We Min Aun, Butterworths Asia, 1995 that:

> … Clearly, a plaintiff, or a defendant who defends action or counterclaims against the plaintiff, has submitted to the jurisdiction.

[16] The filing of an affidavit by a party to the action is a clear indication that the party had submitted to the jurisdiction of the particular court, as was noted in *Sandy M Chiew @ Martinez v James Chiew Siew Hua* [2003] 2 MLJ 168. Here, the High Court (Brunei Darussalam) observed at p 182 that:

> The respondent's position is markedly different. He not only appeared before the senior registrar to seek a stay of the order, re the surrender of the children's passports, but also filed a detailed affidavit in support. Besides his attendance in chambers before the senior registrar and the filing of the affidavit in proceedings that had been commenced by the petitioner in the High Court before his conversation…is ample evidence that he had voluntarily accepted the jurisdiction of that court. He cannot now in my opinion be heard to disclaim it…

[17] No doubt the plaintiff, had a decision favourable to him been arrived at by the Australian courts after consideration of his affidavits dated 6 October 2003, would 30 have taken advantage of such a decision. It would be inequitable to now allow him to attempt to escape the jurisdiction of the Australian courts because he did not succeed in his attempted defence. It is thus my conclusion that the plaintiff had clearly submitted to the jurisdiction of the Australian courts by the filing of not one, but two, detailed affidavits of the plaintiffs both affirmed on 6 October 2003, and by also sending the courts in the Australian proceedings the affidavit of Dr Nor Hamidah Mohd Salleh affirmed on 3 October 2003, and the affidavit of Jaswant Kaur a/p Banta Singh affirmed on 2 October 2003 and should therefore be stopped from inequitably taking a second bite at the cherry by instituting these Malaysian proceedings before me which I hereby do.

[18] It is obvious from the facts above mentioned that the plaintiff had full knowledge of the Australian proceedings prior to his application by ex parte summons in chambers dated 24 May 2004 which resulted in him being granted the ex parte interim order dated 24 May 2004. Indeed, the plaintiff had even filed two detailed affidavits in his defence in the Australian proceedings, both affirmed on 6 September 2003, more than nine months prior to his application for the said interim order. It is trite law that an ex parte order may be set aside if the applicant does not make full and frank disclosure of the relevant facts before the court. As observed by Mohamed Dzaiddin J (as he then was) at p 59 in the case of *Tan Poey Kheng v Ma Peng Kiat* [1984] 1 MLJ 58, OCJ:

> when applying for an ex parte order, it is the duty of the applicant to make a full and fair disclosure to the Court of all the relevant facts of which he knows; and failure to do so may itself be ground for setting aside such an order — see *The Hagen* (1908) P 189, 201; *Lazard Brothers & Co v Midland Bank* [1933] AC 289, 307.

[19] Surely, the existence of the proceedings for custody of the daughter, of which the plaintiff was fully aware of at all material times and had even participated in by the filing of affidavits in his defence, merited disclosure prior to this court making the decision to involve itself in considering the same matters previously considered by the Australian courts, thus wasting this court's valuable time in litigating a matter which

had already been litigated elsewhere. The fact that the plaintiff did not disclose such a material fact is a clear manifestation of the plaintiff's deceit, mala fides and abuse of the court's process and should itself be a justified ground for setting aside the interim order dated 24 May 2004 and a refusal in the face of such deceit for this court to continue to entertain and consider any further proceedings by the plaintiff.

[20] As above mentioned, the plaintiff, the defendant and the daughter are all Australian citizens. The plaintiff brought the daughter to Malaysia without the defendant wife's knowledge and consent, that is unilaterally, severing contact between the daughter and the defendant wife. It is thus to my mind that even in applying the welfare principle in the interests of justice and the welfare of the daughter the court should not countenance such a unilateral movement of the daughter to Malaysia. In 'kidnapping' cases such as the present, where the child is abducted by one parent and brought to another country without the other parent's knowledge and consent, it is in the child's welfare to be returned to its home country, unless there is compelling reason to the contrary, or the child would come to any harm if returned. In the English Court of Appeal case of in *Re T (Infants)* [1968] 1 Ch 704, the mother who was of English origin brought the two children of the marriage (then aged 6 and 4, respectively) to England from the matrimonial home in Canada, unknown to their father, a Canadian, and unsupported by, through not in defiance of, any order of a Canadian court. The children had been with the mother for one year before the initial application was heard. The English Court of Appeal here categorically stated that at pp 714, 715:

> I think it is right to say that this court sets itself against these unilateral movements of children…
>
> … It seems tome that the removal of children from their home and their surroundings by one of their parents who happens to live in or have connections with another country is a thing against which the court should set its face, and that, unless there is good reason to the contrary, it should not countenance proceedings of that kind….' At pp 716E, 716F to 717B, the Court of Appeal …
>
> ….the question is, first, where do the children belong, where is the matrimonial establishment?
>
> He (ie Pennycuick J whose judgment was being appealed against in this case) decided that it was in the interests of these children, being Canadian children with a Canadian father and a Canadian grandfather, that they should go back to their home in Canada and that, if there are going to be disputes between the parents about their custody and control, the proper court to decide that was the Alberta court. In that I wholly agree with him; I think it is the right order to make in a case of this sort, where there is nothing to be said against the father's proposals that he should have the right to have them back with him in their proper home… this court is not to be compelled to say, in the abstract so to speak, that the father or the mother ought to have care and control; that is not the point in a case of this sort; the point is that these children belong in Canada, and other things being equal, there they should go.

The court also noted that: at p 717C–D:

> '… But that she (ie the mother who abducted the children) should by her own motion be able to create a situation where he is entirely cut off from them is something which I do not think the court ought to countenance.

> … It is a conclusion (ie the children to be returned to Canada) which I hope may lead to both these parents having continuing contact with these children, whereas the mother's (the abductor) proposals would produce exactly the opposite effect…and at p 718B, C
>
> … If care and control is given, as she asks, to the mother (the abductor), they will remain with her in England, virtually cut of from their father, who is an artisan of adequate but modest means… Their return to Canada is, it seems to be, their only prospect of growing up under the influence of and knowing both their parents…

[21] The Court of Appeal came to this conclusion after being satisfied that 'no danger to the children is involved in this step, (per Russell LJ). It is seen therefore the established judicial view (aforesaid) is rightly against 'kidnapping' cases, even with full consideration of the children's welfare and best interests, and unless there are compelling reasons not to return the child to their home country. This judicial view is present in many other English cases, including *In re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250 where German infants (10 and 8 years old) were removed from Germany by their English mother and brought to England. When the case came before the English Court of Appeal (the children had been with the mother for one year by this time), the decision of the judge in the court below to return the infants to Germany in their 36 father's custody was upheld, with the Court of Appeal significantly stating at p 264F–G that:

> To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contracts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted…

[22] At p 264H:

> … The judge may well be persuaded that it would be better for the child that… merits (ie of the case) should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here…
>
> … An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child…

The Court of Appeal in this case agreed with the judge's decision that (see p 265C–G):

> The concept of the welfare of the children (ie that the welfare of the children is the court's paramount consideration in custody proceedings) in this context is not limited to questions as to which parent can produce the nicest surrounding or even the best education. It goes much further than that. The correct approach is this; these are German children. They have always been brought up in Germany. They are German nationals. They ought to be able to look forward to a future in their own country. Are the proposals of the father or the mother likely to promote their welfare, having regard to those long-term objects? And it is perfectly plain that those considerations point overwhelmingly to their immediate return to their own

A country, to a resumption of their education in the appropriate schools in Germany, which was unfortunately interrupted by the decision of their mother…

… But I have no doubts on the facts of this case that the solution must be that the children must be restored to their own country, that their future destiny should be decided, if there is a dispute between the parents, by the courts in Germany where some proceedings are already pending; and that if the mother wishes to assert her right to care and control of the children, she should institute proceedings to that end in the court of the domicile, which is Germany.

It is also significant that the judge in the court below in *In re L (Minors) (Wardship: Jurisdiction)* observed that:

…where the children are foreign children, who have always lived in a foreign home, their life should continue in those, their natural, surroundings, unless it appears to the court on analysis of the evidence that it will be harmful to the children if they are returned.

[23] *In re H (Infants)* [1966] 1 WLR 381, the children in this case were American, as were the parents. The mother brought them to England without the father's knowledge and consent. The mother appealed to the Court of Appeal (children were seven and eight years old at time of appeal) against the decision of Cross J at first instance that having in mind the welfare of the children who were American children with a home in the United States, the justice of the case required them to be returned without delay to the jurisdiction of the New York court so that the question of where and with whom they should live might be decided as soon as possible by that court. The Court of Appeal upheld Cross J's decision, observing that, at p 397D:

if these boys are to be sent back to the United States at all, then it is in their interest, and in the interests of their welfare, that they should be sent back as soon as possible, indeed, the sooner the better…

At p 397G:

….in such a case as the present it was not necessary to go into all the disputed question between the parents, but that he ought to send these boys back to their own country to be dealt with by the court of their own country, provided that he (ie the judge) was satisfied… That they would come to no harm if the father took them back to the United States…

At p 403D:

… If he (referring to Morton J in the case of *In re B's Settlement* [1940] Ch 54) chose to take the course which the judge took in the interests of the children, as he thought, of sending them back to the United States with no more inquiry into the matter than to ensure, so far as he could, that there was not danger to their moral or physical heath in taking that course. I am of the opinion that he was amply justified, and that that was the right way in which to approach the issue…

[24] *In re E (D) (An Infant)* [1967] 1 Ch 761. The parents in this case were both American citizens as was the infant. The plaintiff in the action before the English Court was the child's aunt (that is, the deceased father's sister) who had brought the infant to England from the United States in defiance of an existing order of the court of New Mexico. The judge at first instance (Cross J) decided that unless there were

compelling reasons to the contrary, the child should go beck to the United States. The Court of Appeal agreed with Cross J's decision. The Court of Appeal stated, in relation to Cross J's decision at p 768 G that:

> … At the outset of his (Cross J's) judgment, after expressing his concern at what he described as the growing tendency, which has recently been apparent, of kidnapping children in this way and removing them from the jurisdiction of a foreign court, the judge proceeded as follows:
>
> > The courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. The substitution of self help for process of law in this field can only harm the interests of wards generally, and a judge should, as I see it, pay regard to the orders of the proper foreign court, unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child.
>
> First of all, I would like to say, by way of comment on that passage, that I wholly agree with, and would wish to support, everything that the judge said about the duty of all courts not to countenance behaviour of the kind there referred to…

[25] The court also affirmed Cross J's observation that 'As *in re H (infants)* shows, unless there are compelling reasons to the contrary, the child ought to be sent back…'.

[26] In the present case, I am of the view that there are no such compelling reasons for not returning the daughter to Australia present in these proceedings before me. The defendant wife in these proceedings had had a close and loving relationship with her daughter prior to her abduction and the said daughter had been well-settled in Australia with the defendant wife. The daughter would not come to any harm if returned to Australia. It is in the daughter's welfare and interest for her to be returned to Australia, her home, her school, her friends and relatives, where the issue as to who is to have custody can be decided by the Australian court, the court of the country to which the daughter has the most real and substantial connection. In fact, there is compelling reason for the daughter to be returned to Australia and for the Australian courts to decide the issue of custody. If need be, since it it that court that can reverse the order in relation to the cancellation of the daughter passport. Until then, the order of the Australian court stands and the daughter remains a fugitive. In the Malaysian Court of Appeal case of *Neduncheliyan Balasubramaniam v Kohila a/p Shanmugam* [1997] 3 MLJ 768, the aforesaid principles were acknowledged and followed. It was categorically held by the court that where the infants and the father were Canadian citizens and the mother was a Malaysian citizen and permanent resident of Canada who was keeping the infants in Malaysia without the consent of the Canadian father, the Malaysian court would not rule on custody, as this should be decided by the Canadian courts. The welfare principle, that is that the paramount consideration when deciding cases on custody should be the welfare of the infant, was not ignored in this case; but as the children would come to no harm when returned to Canada. It was appropriate that the family return to Canada for the issue to be dealt with in the Canadian courts. Mahadev Shankar JCA in *Neduncheliyan* held at p 787 that:

> In the case of the children of foreign nationals, it should be self-evident that the duration of the protection afforded should only be for so long as the children can lawfully remain in

A the country. In their case, we think it reasonable to state that where they are transient visitors, the court should only intervene if the harm to the children can be classified as a real and immediate danger to their physical well-being from anyone including their parents.

At p 790:

B Of course, the basic rule is that the paramount consideration is the well-being of the infants. But where the children are Canadian nationals, the question is where do the children belong, where is the matrimonial establishment, and which is the proper court to decide the future of these nationals….

In the same, Mahadev Shankar JCA also observed at p 791 that:

C The full text of the report, *In re L* makes it clear that the words 'kidnapping' and 'abduction' in some cases has acquired a technical meaning which does not necessarily involved coercion. Both the husband and the wife have an equal right to the custody of the children. Therefore, both have an equal obligation to ensure that nothing is unilaterally done which has the practical effect of depriving the other of the society of the children. B (ie the father) is a Canadian. He has no right of residence here. To say he can come here and visit his D children at will is impractical to the point of being farcical.

The learned Court of Appeal judge then concluded that: (at p 792):

E For all the reasons aforesaid, we hereby set aside the order of the High Court but we do not make any concluded view as to which parent should have permanent exclusive custody of the children. This is a matter for the Canadian courts. All we are ordering is that the children should be delivered into the care and custody of B their father (ie who had not consented to the other spouse taking the children) who shall be at liberty to remove them to Canada to the matrimonial home at 100 Dandalk Drive, Apartment 914, Scarborough, Ontario Canada.

F In coming to conclusions, the Court of Appeal relied heavily on the English cases of *In re T (Infants)* [1968] 1 Ch 704 and *In re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250, aforesaid. The court also cited *G v G (Minors) (Abduction)* Vol 2 (1991) Family Law Review observing:

G a comment by the Nigel Lowe (in *G v G*) which we think correctly states the position for abduction cases from 'non-convention countries; ie:

… if the child's settled home was in that country, a peremptory order for the return of the child will be ordered unless there is some prima facie evidence either that the child would be harmed or that the host country would not apply the paramountcy of the child's welfare principle…

H

[27] It is noted that these two factors, ie:

(i) whether the child would be harmed if returned to Australia;

I (ii) whether Australia would not apply the paramountcy of the child's welfare principle

are clearly not present in these proceedings. In these proceedings before me the daughter was brought to Malaysia by the plaintiff unilaterally without the knowledge and consent of the defendant wife. The defendant wife has no right of residence in Malaysia and has been deprived of her daughter's company and society for more than

1% years (barring the one meeting in June 2003). There has been absolutely no cogent evidence adduced on the part of the plaintiff that the daughter would come to any harm if returned to Australia. There exist no compelling reasons against returning the daughter to Australia. It is clear from the aforesaid authorities that in these circumstances, it is in daughter's welfare for her to be returned to Australia, her home, and united with her mother, and it is the Australian court who should decide the custodial dispute involving the Australian child and Australian parents.

[28] In the present case, it is clear from the aforesaid that on the pretext of going on a holiday to Europe, the daughter was brought into Malaysia unilaterally by the plaintiff without the defendant wife's knowledge and consent in January 2003. The defendant wife had instituted proceedings in Australia on 4 February 2003 for custody of the daughter, and was granted orders, including interim orders dated 17 April 2003 and 7 October 2003, for custody of the daughter and the return of the daughter to Australia. The defendant wife has obtained a final Australian order dated 2 May 2004 for custody of the daughter and the return of daughter to Australia. The plaintiff husband was at all material times aware of and had participated in the Australian proceedings by, inter alia, filing two detailed Affidavits, both affirmed on 6 October 2003, in his defence in the Australian courts, and had thereby submitted to the jurisdiction of the Australian courts. Despite his knowledge of the Australian proceedings, the plaintiff Husband, on making his applications (by originating summons dated 22 May 2004 and summons in chambers dated 24 May 2004) to this court, did not make full and frank disclosure by informing the court that there were proceedings already instituted in Australia. The plaintiff husband, the defendant wife and the daughter are all Australian citizens. The plaintiff husband, the defendant wife and significantly, the daughter had been ordinarily resident in Australia prior to her abduction. The daughter's connection to Malaysia is extremely tenuous and uncertain. As her Australian passport had been cancelled pursuant to the Australian order dated 17 April 2003, the daughter is in actuality a fugitive in Malaysia. The daughter should therefore be returned to her home, family and friends in Australia. The Australian court is clearly the more appropriate forum to hear this matter.

[29] For these reasons, order in terms of prayers (1) (2) and (3) of encl (17) is hereby granted. As to prayer (5) each party bears its own cost.

Order accordingly.

Reported by Peter Ling